**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**FIRST APPEAL No. 2501 of 1994**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE AKSHAY H.MEHTA**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**JITENDRA TRILOKCHANDRA SHAH - Appellant(s)**
**Versus**
**NOT JOINED & 2 - Defendant(s)**

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**Appearance :**
MR HD VASAVADA for Appellant(s) : 1,
None for defendant(s) : 1,
RULE UNSERVED for Defendant(s) : 2,
RULE SERVED for Defendant(s) : 3,
MR PV NANAVATI for Defendant(s) : 3,
MR VIBHUTI NANAVATI for Defendant(s) : 3,

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**CORAM : HONOURABLE MR.JUSTICE AKSHAY H.MEHTA**

**Date : 10/01/2007**

**ORAL JUDGMENT**

1. This appeal is filed by the original claimant to make a grievance that his claim under the head of future

loss of income has not been considered and no compensation is awarded under the said head. In the process the appellant has challenged the judgment and award made by MACT, Panchmahals at Godhra in MACP No. 415 of 1986 dated 30th August, 1993.

2. At the outset it is made clear that the respondents i.e., original opponents have neither preferred any substantive appeal nor filed any cross objections in this appeal to challenge the findings that have been given by the Claims Tribunal in favour of the appellant. In the present appeal, original opponent no. 1 who happened to be the driver of the offending vehicle has not been joined as party. Respondent no. 2 the owner has not been served with the notice of admission of the appeal. The appeal was admitted on 6th April, 1995. Since earlier notice, immediately after the admission of the appeal to final hearing, was not served this Court by order dated 8th August, 2006, issued fresh notice to respondents no. 2 and 3 making it returnable on 12th September, 2006. The record shows that even the fresh notice could not be served on respondents no. 2, but respondent no. 3 the insurance company has been served. The endorsement shows that notice to respondent no. 2 could not be served because he was not to be found. The

accident in question took place on 25th October, 1985 and the claim petition is of the year 1986. It is, therefore, obvious that it will not be possible for the appellant now to locate respondent no. 2 and serve the notice of this appeal on him. Here as stated above, the findings that have been given in favour of the appellant have not been challenged either by respondent no. 2 or respondent no. 3. The question is only with regard to future loss of income, meaning thereby, if the appeal is allowed, additional compensation is required to be paid to the appellant. Naturally, the insurance company will be responsible to pay compensation. Hence, technically speaking respondent no. 2 is required to be served, but considering the aforesaid circumstances and also the fact that the real contesting party, the insurance company which is represented through its lawyer, there is no need to allow this appeal to linger on for indefinite period, more particularly, when the accident is of the year 1985 and the MAC Petition of the year 1986. Hence, with the consent of learned advocate for the insurance company the matter is finally heard.

3. The accident in question took place on 25th October, 1985 at about 7:00 a.m. The appellant was proceeding on his motorcycle bearing registration no. GUB

822 from Godhra to Devgadhbaria for his work. According to him he was driving his vehicle at moderate speed and correct side of the road. When he reached near Vinod restaurant, Piplod village, the truck owned by respondent no. 2 and driven by his driver suddenly appeared from the by-lane and knocked the appellant down. It was driven in a rash and negligent manner. As a result of the same, the appellant sustained serious injuries on his left leg. He was immediately rushed to Godhra and admitted in the hospital of Dr. Narendra Pajwani. Subsequently he was removed to Baroda and admitted in the hospital of Dr. Suketu Trivedi, a well-known Orthopedic Surgeon of Baroda. According to the appellant, he at the time of accident was working as junior clerk in the Bank of Baroda and was discharging duty in the head office at Baroda. On account of the injuries suffered by him, he ultimately, lodged claim of Rs.1 lakh with MACT at Godhra.

4. The driver of the vehicle was not joined as opponent. Respondent no. 2 did not contest the petition. However, respondent no. 3 the insurance company resisted the claim by filing written statement. It denied all the averments made by the appellant in the claim petition and prayed for dismissal of the petition. The Tribunal on the

basis of the material produced before it, including the oral evidence arrived at a conclusion that the accident occurred due to sole negligence of the driver of respondent no. 2. So far as the quantum is concerned, it appears from the judgment and in particular, paragraph 23 of the judgment that originally the claim was of Rs. 1,01,000=00 which was raised during arguments to Rs.3,58,888=00. The Tribunal in a tabular form has given details of the same. The last column of the said table gives details about the amount awarded to the appellant. It has awarded Rs.10,000=00 under the head of pain and suffering, Rs.15,000=00 for medical treatment, Rs.10,000=00 for extra expenses and Rs.15,000=00 for loss of actual income. So far as the loss of future income is concerned, nothing has been awarded. It is this finding which is now under challenge in his appeal.

5. I have heard Mr. V.P. Nanavati learned advocate appearing for respondent no. 3 insurance company. He has submitted that the judgment and award made by the Tribunal are just and proper. According to him, the finding given by the Tribunal that no future loss of income was caused is entirely based on the evidence of the appellant himself. Hence, the Claims Tribunal was justified in rejecting the claim under the said head.

6. I have closely perused the record of the case, including the oral evidence. It appears that the appellant in his deposition which is recorded at Exh. 28-A has stated that on the date of the accident, he was working as junior clerk in Bank of Baroda and was drawing salary of Rs.2,000=00. He has further stated that if he had received promotion he would have earned salary of Rs.8,500=00. The Claims Tribunal has, therefore, concluded that the appellant in fact had not suffered any loss of future income. The Claims Tribunal has placed reliance on the decision rendered by the Division Bench of this Court in the case of **State of Gujarat v. Somabhai Dhurabhai Sindhava & Ors., reported in 1993 (2) GLR pg. 1043** and has observed that : “It has laid down the Tribunal must take a sensible view and not a dogmatic view, Medical Certificate regarding percentage of disability must not have a final say and award on interest also requires rethinking.”. The Claims Tribunal has also referred to earlier judgment rendered in the case of **Gurdipsinh S/O. Bisensingh Sadhu v. Chauhan Bhupendrakumar Udesing & Anr. reported in 1980 [Vol. XXI] GLR pg. 221**, wherein it has been held that even when there is permanent injury to knee joints, but there is no actual loss of earning capacity, the compensation has to

be awarded for future loss of income. The Claims Tribunal has however preferred to rely on the judgment in the case of State of Gujarat v. Somabhai Dhurabhai Sindhava & Ors. (supra) on the ground that it is later in point of time. The Claims Tribunal has, therefore, not awarded any compensation under the head of future loss of income.

7. So far as the medical evidence is concerned, it shows that the appellant had suffered fracture of tibia and fibula of the left leg and it has resulted into 15% permanent disability. It has also stated in the evidence of Dr. Yogesh Thakker which is at Exh. 51 that the disability is likely to increase. In view of the same, the disability in respect of the entire body could be safely assessed at 10%. On the date of the accident as the record shows he was drawing salary of Rs.1,900=00, but adopting the formula laid down in the decision rendered by the Division Bench of this Court in the case of **Mohanbhai Gemabhai v. Balubhai Savjibhai reported in 1994 ACJ at pg. 260**, the prospective income of the appellant could be assessed at Rs.2850=00. Considering the loss at 10% the monthly loss would come to Rs.280/- (as round figure), which could be multiplied at 12 i.e. 280 x 12, which would bring the annual loss at Rs.3,360=00. The appellant on the date of the accident

was aged 29 years, hence multiplier of 15 can safely be applied. That would bring the loss of future income to Rs.50,400=00. The important question is whether in the facts and circumstances of the case, the said amount can be awarded to the appellant. The Claims Tribunal by placing reliance on the case of State of Gujarat v. Somabhai Dhurabhai Sindhava & Ors.(supra) has denied it on the ground that the said judgment laid down the law that, when there is no actual loss of future income, it cannot be awarded. The Claims Tribunal has also assigned reason that the said judgment being later in point of time, it was inclined to follow the same, ignoring the judgment reported in Gurdipsinh S/O. Bisensingh Sadhu v. Chauhan Bhupendrakumar Udesing & Anr. (supra). However, after the delivery of the judgment by the Claims Tribunal, there is yet another decision given by this Court in the case of Mohanbhai Gemabhai v. Balubhai Savjibhai (supra). The Division Bench in the similar circumstances has laid down as under:

> “16. It appears that the amount of compensation under this head is refused, as there was no ostensible or manifest immediate loss in the salary income of the claimant. With due respect, this approach of the Tribunal is not only erroneous, but is also illegal. The Tribunal is required to consider various aspects and relevant circumstances while determining the issue of award under the head of prospective economic loss. The claimant has sustained permanent partial disablement and there is no

> dispute about this aspect. The bodily integrity of the claimant is also substantially affected. The functions of the right arm are found to have been restricted and reduced to the extent of 50%. The claimant was young man of 30 years at the relevant time. Could it be, even for a moment, conceived that the effect on the bodily integrity like that of the common and partial disablement to the extent of 16% in the use of right hand would not affect the earning capacity of the claimant? What is required to be examined is the effect sustained by the claimant on account of the accident on the earning capacity. The effect on earning capacity must be judged in the light of loss or permanently affected limb and the profession of the claimant or the employment of the victim of the road accident. Firstly, it is necessary to ascertain the extent of physical disability. Thereafter, it is necessary to find out to what extent the earning capacity of the injured is affected. No-doubt, it is true that the percentage of disablement may not correspond to the percentage of loss of earning. It is not entirely right to always make the future loss of income co-existent with that of disability. It is not an algebraic problem which can be solved by the abstract formula. What the evidence is as to the permanent disablement and what is the extent of impairment of the body or whether it is complete or partial? Whether it is temporary or permanent? An assessment must be made as to what effect such disability would have on entire function of the body and how it would consequently affect the earning capacity. It may happen that a person who has sustained significant impairment on a particular part of the body, and yet, it may not affect seriously his earning capacity, in so far as this particular type of avocation or employment is concerned, Conversely, it may happen that an impairment of hand or arm or legs to a person like labourers would materially affect his earning capacity. Therefore, it is not the only extent of disablement and, also, the extent of the impairment of body, but its resultant impact on the earning capacity which matters and has a role to play in the determination of reasonable and just amount of compensation."

It has further observed as under :

“19. The Tribunal is bound to consider the resultant disablement arising on account of the accident and its impact on earning capacity. It is obligatory to consider the loss of earning capacity. If the loss of earning capacity is not estimated by the Medical Expert, then in the facts and circumstances of the case, even the Tribunal can make the rough assessment and estimation of loss of earning capacity in so far as possible, so as, to award just and reasonable amount of compensation under the head of “prospective economic loss”. It is submitted and pointed out that this Court, in a Division Bench judgment in the case of Gurdipsingh V/s. Chauhan Bhupendra Kumar Udesingh, 1980 ACJ 184 (Gujarat), has held that the Court can make rough estimate about loss of earning capacity in the light of the facts and circumstances and the available data of medical evidence on record. In that case, there was no specific evidence of an expert as to what was the exact permanent partial disablement to a particular limb of the anatomy and considering the limited movements and impairment on the knee, this Court had conservatively estimated the loss of earning capacity at 25%. It is true that in that case the claimant was awarded Rs.45,000/-, though there was no immediate reduction in his salary as a Technical Assistant in ONGC.

23. The starting point for the assessment of the probable loss should be the amount that the claimant was getting or earning at the time of the accident. What he could have earned or what prospective rise he could have received in earning, had there been no accident? It is true that the prospective rise in earnings would be spread over long years. It may be possible that the claimant might not have got promotion at all, even if he had not sustained injuries. On the other hand, it is equally possible that he might have earned promotion even if he had sustained injuries which we have seen in the present case. Whether the claimant was likely to be thrown out of the job must also be taken into consideration. What he would have actually become would be a matter of anybody's guess. Whether he would have earned the amount which is claimed by him, by way of loss on account of the accident, will also be a matter of permissible guess, depending upon several imponderables and uncertainties.

> Therefore, at times, we have to make an estimate, often very rough estimate, and the assessment may be based on the speculative guess which is permissible in such cases. The whole of the difference between the actual earnings and probable future earning obviously could not be taken as the present value of the financial damages caused to the claimant.
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> Therefore, present value thereof has got to be assessed and ascertained. Considering all these facts and circumstances, the claimant in this case would be entitled to atleast an average amount of Rs.225/- per month by way of prospective economic loss. Therefore, annual loss works out to Rs.225 x 12 = Rs.2700/-. We are inclined to adopt a multiplier of 15 as this is a case of young man of 30 and he has long working life ahead of him. Accordingly, damages under the head of future prospective earnings would come to Rs.40,500/- on the ground of loss of earning capacity. Hence, the claimant is entitled to Rs.40,500/- [Rs.2,700/- x 15] under this head."

8. In view of the aforesaid decision which is also later in point of time, than the judgment given in the case of State of Gujarat v. Somabhai Dhurabhai Sindhava & Ors.(supra), I am inclined to follow the subsequent judgment. Hence, I hold that the finding given by the Tribunal on the issue of future loss of income is erroneous and it is required to be quashed and set aside and it is hereby quashed and set aside. The appellant is entitled to receive sum of Rs.50,400=00 by way of compensation under the head of future loss of income. The claim in the petition is of Rs.50,000=00. Hence, the entire amount is required to be awarded to the appellant under this head. The insurance company is, therefore,

directed to deposit Rs.50,000=00 being additional compensation for future loss of income in the Tribunal within a period of six months from the date of this judgment together with interest at the rate of 12% per annum and proportionate costs.

9. In the result, the appeal is allowed. R & P to be re-transmitted to the Tribunal forthwith.

[Akshay H. Mehta, J.]

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